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Nos. 09-976, 09-977, 09-1012

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In The
Supreme Court of the United States

PHILIP MORRIS USA INC.
(f/k/a PHILIP MORRIS, INC.) and R.J. REYNOLDS TOBACCO CO., et al. and LORILLARD TOBACCO CO.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION OF TOBACCO-FREE KIDS ACTION FUND, ET AL.

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RULE 29.6 STATEMENT

Respondents, who were granted intervention below, are Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and National African American Tobacco Prevention Network. They have no parent companies, and do not issue stock.

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STATEMENT

In a case brought by the United States pursuant to its authority under 18 U.S.C. § 1964(b), the district court concluded that for decades the major manufacturers of cigarettes engaged in a massive coordinated campaign to deceive millions of American consumers, and particularly teenagers, about the toxicity and addictiveness of cigarettes. Pet. App. 119a-1885a. The court concluded that this misconduct violates RICO, and is likely to continue. *Id.* 1885a-1921a.

The district court imposed several remedies. First, in light of extensive record evidence that "[d]efendants have known for decades that there is no clear health benefit from smoking low tar/low nicotine cigarettes," but nonetheless "extensively – and successfully – marketed and promoted their low tar/light cigarettes as less harmful," Pet. App. 1255a, the court enjoined the defendants from "conveying any express or implied health message or health descriptor for any cigarette brand" including "the words 'low tar,' 'light,' 'ultra light,' 'mild,' [and] 'natural. . . .'" Final Judgment and Remedial Order ("Final Order") § II.A.4; *see also* Pet. App. 2041a ("[T]he only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, and potential smokers, and the American public about 'light' and 'low tar' cigarettes is to prohibit them from using any descriptor which conveys a health message").

Second, because defendants have for decades made "fraudulent public statements about cigarettes" in various media, the district court directed them to issue corrective communications in the "same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages." Pet. App. 2047a-48a. These communications are to be made on defendants' websites, cigarette packaging, and countertop displays, as well as in major newspapers and on television stations. Final Order § II.B.

Finally, in light of the overwhelming evidence concerning defendants' "fraudulent statements about the devastating consequences of smoking," Pet. App. 2058a, the court enjoined the defendants from "making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor that is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes." Final Order § II.A.3.

The court of appeals affirmed the district court's determination on liability and affirmed most of the remedial portion of the district court's order, but directed that certain portions of the order be narrowed.[1]

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[1] *See* Pet. App. 81a-83a, 88a-89a (directing that corrective statements be narrowly confined, and that the requirement for

(Continued on following page)

The petitions for a writ of certiorari challenging the propriety of these remedies should be denied. None of the remedy issues addressed by Petitioners warrants review by this Court, and, in any event, Petitioners' arguments – most of which have not yet even been presented to the district court – are premature at this time.[2]

REASONS FOR DENYING THE PETITIONS

A. THE DESCRIPTOR BAN DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioners contend that the district court erred in banning the use of descriptors such as "light" and "low tar" because these terms were approved by the Federal Trade Commission ("FTC"). They also contend that the court of appeals' affirmance of the ban conflicts with rulings of other courts of appeals that have relied on FTC's alleged approval of these terms. R.J. Reynolds Tobacco Company Petition for Certiorari ("RJR Pet.") at 29-34; Lorillard Tobacco Company

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countertop displays be reconsidered); *id.* 74a-75a (directing that the injunction be modified to exempt certain foreign activities). The district court also imposed other remedies not appealed and not at issue here.

[2] Because Respondents intervened below on the issue of remedies, *see* Pet. App. 89a, this Opposition does not address the Petitioners' requests for review of the lower courts' liability determinations.

Petition for Certiorari ("Lorillard Pet.") at 30-31. Petitioners are mistaken.

As the court of appeals correctly and unanimously ruled, Pet. App. at 47a, Petitioners' argument regarding the FTC "is entirely foreclosed by" this Court's recent decision in *Altria v. Good*, which made clear that the FTC has never *"condoned representations of* [tar and nicotine] *yields through the use of 'light' or 'low tar' descriptors."* 129 S. Ct. 538, 550 (2008); *see also id.* ("the FTC has no long-standing policy authorizing collateral representations based on Cambridge Filter Method test results"); *id.* at 551 (noting that in 2008 the FTC rescinded its guidance concerning the Cambridge Filter Method) (citing 73 Fed. Reg. 74,500 (2008)).

Particularly in light of this Court's ruling that the FTC has *not* approved the use of such descriptors, the district court did not err in barring the defendants from continuing to use these descriptors based on record evidence that defendants "falsely marketed and promoted low tar/light cigarettes as less harmful than full-flavored cigarettes," thereby misleading consumers into believing that smoking light and low tar cigarettes in fact provides a health benefit. *See* Pet. App. 971a. The *Altria* ruling also resolves Petitioners' claimed circuit split on this issue.[3]

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[3] Given this deliberate fraud, Lorillard Tobacco Company's further contention that the descriptors are entitled to First Amendment protection, Lorillard Pet. at 30-31, is also without

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Petitioner Philip Morris USA Inc. also asserts that plaintiffs can no longer demonstrate that a descriptor ban is necessary because Congress recently passed new legislation that will require that such descriptors be approved by the Food and Drug Administration. Philip Morris USA Inc. Petition for Certiorari ("Philip Morris Pet.") at 28-31. However, this is a factual question that must be resolved in the district court in the first instance, not in this Court. *E.g. Salazar v. Buono*, 2010 WL 1687118, *15 (U.S. Apr. 28, 2010) (remanding to district court to undertake "the highly fact-specific . . . inquiry" necessary to determine whether new legislation warrants a modification to the court's injunction); *Horne v. Flores*, 129 S. Ct. 2579, 2600 (2009) (remanding for district court to consider whether changed circumstances, including a new law, warranted modification of the court's remedy).

This is particularly true in light of the district court's findings – affirmed by the court of appeals – that continuing legal violations are likely despite Petitioners' contention that the State Master Settlement Agreement similarly precluded ongoing legal violations. Pet. App. 2016a-21a; *see also* Philip Morris Pet. at 28-31. Should Petitioners be dissatisfied with the district court's decision as to whether the new

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merit. *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it").

legislation obviates the need for the descriptor ban, that issue may be addressed on appeal at that time. It is entirely premature at this juncture.

Petitioners also fail to mention that the tobacco industry *has challenged the new legislation*. *See Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010). Because the outcome of that suit also may bear on this argument, the continuing propriety of the descriptor ban is an inherently factual matter that belongs before the district court, which can consider the new lawsuit and any other appropriate factors. *E.g. Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 369 (1992) (remanding to district court to consider whether changed circumstances warranted an alteration in a remedial decree).

B. THE ORDER DIRECTING CORRECTIVE STATEMENTS ALSO DOES NOT WARRANT REVIEW.

Petitioners' challenges to the district court's order on corrective statements, which the court of appeals unanimously upheld, also do not warrant review in this Court. *See* RJR Pet. at 34-36; Lorillard Pet. at 32-33. Contrary to Petitioners' claim, there is no disagreement among courts of appeals as to whether corrective statements may be imposed to address "a long history of deception which has so permeated the consumer mind that the 'claim was believed by consumers long after the false advertising had

ceased. . . .'" *Nat'l Commission on Egg Nutrition v. FTC* ("*NCEN*"), 570 F.2d 157, 164 (7th Cir. 1977) (quoting *Warner Lambert v. FTC*, 562 F.2d 749, 771 (D.C. Cir. 1977)). The district court's extensive findings that for decades defendants engaged in a massive fraud to deceive consumers concerning, *inter alia*, the adverse health effects of smoking and the nature of addiction constitute the very "long history of deception" that warrants these corrective communications here. *NCEN*, 570 F.2d at 164.

Moreover, the rulings on which Petitioners rely – all of which concerned challenges to the *particular* language used in *specific* corrective statements – highlight that their challenge to the district court's corrective statements order is also premature, because the district court has not yet required any specific statements in this case. To the contrary, the court of appeals has specifically directed that the district court, in fashioning corrective statements on remand, "ensure that the corrective disclosures are carefully phrased so they do not impermissibly chill protected speech." Pet. App. 88a-89a.

C. REVIEW OF THE INJUNCTION AGAINST FURTHER FRAUDULENT STATEMENTS ALSO IS NOT WARRANTED.

Finally, Petitioners' challenge to the court's injunction also does not warrant review. Petitioners point to no circuit conflict or other basis for review; rather they argue that the injunctive decree is too

vague. Philip Morris Pet. at 31-34; Lorillard Pet. at 32. Not only is this not a basis for granting review by this Court, *see* Supreme Court Rule 10, but in any event, given the breadth of defendants' misconduct, the district court's injunction against "making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation . . . that misrepresents or suppresses information concerning cigarettes," Final Order § II.A.3, was entirely appropriate. *United States v. Ward Baking Co.*, 376 U.S. 327, 332 (1964) ("when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts") (other citations omitted); *NLRB v. Express Pub. Co.*, 312 U.S. 426, 436 (1941) ("A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past."); *see also* Pet. App. 74a (a "'record of continuing and persistent violations of the (statute) would indicate that that kind of a (general) decree was wholly warranted in this case'") (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949)).

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari concerning the remedies imposed by the district court should be denied.

Respectfully submitted,

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